

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DEBRA K. HART and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Fort Harrison, MI

*Docket No. 00-1536; Submitted on the Record;  
Issued October 23, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that appellant forfeited her compensation for the period December 14, 1992 through March 22, 1997; and (2) whether the Office properly found that appellant was at fault in the creation of an overpayment of compensation in the amount of \$59,099.11 and, therefore, the overpayment was not subject to waiver.

On May 21, 1992 appellant, then a 33-year-old practical nurse, sustained an employment-related lumbosacral strain and right ankle strain as she was lifting a patient. She stopped work on May 23, 1992, received continuation of pay through July 11, 1992 and compensation thereafter. On December 22, 1993 she was placed on the periodic rolls, effective November 1, 1993. Appellant submitted Office forms CA-1032 and EN-1032 dated March 14, 1994,<sup>1</sup> April 18, 1995, March 15, 1996 and March 22, 1997, in which she indicated that she had not been employed or self-employed during each of the previous fifteen months. Appellant returned to limited duty, four hours a day on September 14, 1997.<sup>2</sup> In an investigative report, which includes supporting documentation dated September 7, 1999 the employing establishment informed the Office that appellant was self-employed with her husband in a home-based company, B & H Siding and Windows.

By decision dated September 9, 1999, the Office found that appellant forfeited compensation for the period December 14, 1992 through March 22, 1997 because she failed to report income from employment as required by section 8106(b) of the Federal Employees'

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<sup>1</sup> Although appellant signed this Office form, she did not date it. It was date-stamped received by the Office on March 14, 1994.

<sup>2</sup> The record also contains a schedule award dated January 15, 1999 granted for a 14 percent loss of use of the right leg. The schedule award was to be applied to the overpayment which was created following appellant's return to work in September 1997. The schedule award and any subsequent overpayment is not on appeal to the Board in the instant case.

Compensation Act.<sup>3</sup> In a letter that same date, the Office informed her that it had made a preliminary determination that she had received an overpayment in compensation in the amount of \$59,099.11 for that period. The Office stated that it found appellant at fault in the creation of the overpayment because she had falsified information contained on the 1032 Office forms which she submitted during the period in question. The Office informed her of her rights regarding the overpayment, instructing her to submit the financial information requested on an accompanying overpayment questionnaire.

On October 8, 1999 appellant returned the overpayment questionnaire, which was left blank, indicating that she requested a telephone conference regarding the overpayment. By letter dated January 13, 2000, the Office informed appellant that her case was not in posture for a telephone conference because she had not submitted any financial information and had not provided evidence that would support a finding that she was without fault in the creation of the overpayment. She was given 30 days to submit the required information. Appellant submitted nothing further and by decision dated February 22, 2000, the Office finalized the overpayment decision. The instant appeal follows.

The Board finds that appellant forfeited her compensation for the period December 14, 1992 through March 22, 1997 because she knowingly failed to report her earnings from self-employment.<sup>4</sup>

Section 8106(b) of the Act<sup>5</sup> provides in pertinent part:

“The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies.”

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“An employee who--

(1) fails to make an affidavit or report when required; or

(2) knowingly omits or understates any part of his earnings; forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *Linda K. Richardson*, 47 ECAB 171 (1995).

<sup>5</sup> 5 U.S.C. § 8106(b).

otherwise recovered under section 8129 of this title, unless recovery is waived under that section.”<sup>6</sup>

Section 10.5(g) of the implementing regulations defines “earnings” to include “a reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration.”<sup>7</sup> Section 10.529 provides that an employee who knowingly omits or understates any earnings or work activity in making a report shall forfeit the right to compensation with respect to any period for which the report was required.

An employee can only be subjected to the forfeiture provision of section 8106 of the Act if he or she “knowingly” omitted or understated earnings. It is not enough to merely establish that there were unreported earnings. The Office procedure manual recognizes that forfeiture is a penalty<sup>8</sup> and, as a penalty provision, it must be narrowly construed.<sup>9</sup> The term “knowingly” is not defined within the Act or its regulations. In common usage, “knowingly” is defined as: “[w]ith knowledge; consciously; intelligently; willfully; intentionally.”<sup>10</sup>

In this case, the Office determined that appellant forfeited her right to compensation for the period December 14, 1992 through March 22, 1997 because she did not indicate on forms 1032 that she was employed by B & H Siding and Windows. In a statement dated November 18, 1996, that is contained in the investigator report, appellant noted that the siding business was opened in 1990 or 1991 and acknowledged that, while she received no payment from the company, she performed the following duties: Answering the telephone, filling out contracts, signing most business checks and personal checks, setting up appointments for business, attending 50 to 75 percent of business calls, keeping records of lengths and heights of building after they were provided by her husband, helping her husband measure buildings and keeping records of the measurements. The record further indicates that appellant submitted Office forms CA-1032 and EN-1032 dated March 14, 1994, April 18, 1995, March 15, 1996 and March 22, 1997, in which she indicated that she had not been employed or self-employed during each of the previous fifteen months.

The record thus demonstrates that she worked at a family business but did not report as income, on Office 1032 forms what would have had to be paid to someone else to perform such duties. Appellant contended that she was unaware of this requirement and received no

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<sup>6</sup> While section 8106(b)(2) refers only to partially disabled employees, the Board has held that the test for determining partial disability is whether, for the period under consideration, the employee was in fact either totally disabled or merely partially disabled, and not whether he received compensation for that period for total or partial loss of wage-earning capacity. *Ronald H. Ripple*, 24 ECAB 254, 260 (1973). The Board explained that a totally disabled employee normally would not have any employment earnings and therefore a statutory provision about such earnings would be meaningless. *Id.*

<sup>7</sup> 20 C.F.R. § 10.5(g) (1999).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10(c) (July 1993).

<sup>9</sup> See *Christine P. Burgess*, 43 ECAB 449, 458 (1992).

<sup>10</sup> *Black's Law Dictionary* (5<sup>th</sup> ed. 1979); see *Glenn Robertson*, 48 ECAB 344 (1997).

remuneration for her duties. Upon appellant's own admission, she showed that she was an active participant in the business. The Board, therefore, finds that the Office properly determined that appellant knowingly omitted to report earnings.<sup>11</sup>

The Board further finds that the Office properly determined that appellant was at fault in creating the overpayment of compensation in the amount of \$59,099.11 for the period December 14, 1992 through March 22, 1997 and, therefore, the overpayment for that period was not subject to waiver.

Section 8129 of the Act provides that an overpayment of compensation shall be recovered by the Office unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."<sup>12</sup> Thus, the Office may not waive the overpayment of compensation in this case unless appellant was without fault.<sup>13</sup>

In determining whether an individual is with fault, section 10.433(a) of the Office's regulations provides in relevant part that a recipient, who has done any of the following will be found to be at fault with respect to creating an overpayment.

"(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or

"(2) Failed to provide information which he or she knew or should have known to be material; or

"(3) Accepted a payment which he or she knew or should have known was incorrect."<sup>14</sup>

Section 10.433(b) provides:

"Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she was being overpaid."<sup>15</sup>

The record in this case indicates that during the period December 14, 1992 through March 22, 1997 appellant received wage-loss compensation totaling \$59,099.11. Based on the forfeiture of her right to compensation for the period in question, appellant received an

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<sup>11</sup> See *Alton L. Vann*, 48 ECAB 259 (1996).

<sup>12</sup> 5 U.S.C. § 8129.

<sup>13</sup> See *Linda E. Padilla*, 45 ECAB 768 (1994).

<sup>14</sup> 20 C.F.R. § 10.433(a) (1999).

<sup>15</sup> 20 C.F.R. § 10.433(b) (1999).

overpayment in compensation for this period. The Board, therefore, finds that she was at fault in the creation of the overpayment under both the first and second standards described in section 10.433(a) above, as the record establishes that she had employment during this period and knowingly stated that she was not employed or self-employed. Appellant thus failed to furnish material information to the Office.

The decision of the Office of Workers' Compensation Programs dated February 22, 2000 is hereby affirmed.

Dated, Washington, DC  
October 23, 2001

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Member

Michael E. Groom  
Alternate Member